

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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*Attorneys for Counterclaim Defendant,
Zurich American Insurance Company*

TUDOR INSURANCE COMPANY,

Plaintiff,

v.

FIRST ADVANTAGE LITIGATION
CONSULTING, LLC,

Defendant.

FIRST ADVANTAGE LITIGATION
CONSULTING, LLC,

Counterclaimant and Cross-
Complainant,

v.

AMERICAN INTERNATIONAL
SPECIALTY LINES INSURANCE
COMPANY, FEDERAL INSURANCE
COMPANY, TUDOR INSURANCE
COMPANY, and ZURICH AMERICAN
INSURANCE COMPANY,

Counterclaim Defendants.

Civil Action No.: 1:11-cv-03567 (KBF)
Related Case: 1:11-cv-8923 (KBF)

Hon. Katherine B. Forrest, U.S.D.J.

Civil Action

**COUNTERCLAIM DEFENDANT
ZURICH AMERICAN INSURANCE
COMPANY'S COUNTERSTATEMENT
TO TUDOR INSURANCE COMPANY'S
SUPPLEMENTAL STATEMENT OF
FACTS PURSUANT TO
LOCAL RULE 56.1**

Pursuant to Rule 56.1 of the Local Civil Rules, Counterclaim Defendant Zurich American Insurance Company ("Zurich") respectfully submits this counter-statement as a response to Tudor Insurance Company's Supplemental Statement of Facts:

1. Fabio Caleca testified in the NuWave trial that he served as a consultant for Sagres in connection with Sagres's investment in NuWave. (DE 100-2, Ex. B. to Coughlin Dec. at 38:15-19.)

Zurich's Response: Admitted.

2. Mr. Caleca testified that Sagres invested one-half of its intended investment in NuWave. (Id.)

Zurich's Response: Admitted.

3. Mr. Caleca also testified:

Q [W]hat did Mr. Koss tell you about NuWave?

A I mean, rumors. To me they were rumors, because I couldn't have any confirmation, see any paper. But basically the rumors was [sic] that Troy Buckner was fired by Hyman Beck. . . . [A]nd some unauthorized trading, which was a lot more concerning for us. And then I heard, you know, the same rumor from other sources.

So, I, you know –

Q Before we get to the other sources, what else did Mr. Koss tell you about NuWave?

A Well, he also say there was a report found that with this allegation, and I never saw the report. He never show me the report, but that's what he told me. [sic]

Q But you never saw the report?

A Never.

(Id. at 32:22 to 33:9.)

Zurich's Response: Zurich admits that Mr. Caleca testified as indicated.

4. Mr. Caleca heard the same rumors "a little bit later" from his business acquaintance, Mr. Pasquinelli:

Q . . . Now, what did Mr. Pasquinelli say about NuWave –

A Same rumors. Same rumors. He heard the same rumors. He didn't tell me the source of where he heard, but it was exactly the same kind of stuff circulated. [sic]

(Id. at 36:9-14.)

Zurich's Response: Zurich admits that Mr. Caleca testified as indicated.

5. Based upon his conversation with Mr. Pasquinelli, Mr. Caleca contacted Philippe Volcy, who also heard the rumors:

Q Now, what did you do with this information?

A We start calling the whole word around. [sic] Well, first I went back to Philippe Volcy . . . and ask, query if he knew anything about the story. And he was also aware of these rumors. [sic]

(Id. at 36:17-22.)

Zurich's Response: Zurich admits that Mr. Caleca testified as indicated.

6. According to Mr. Caleca, Mr. Volcy repeated the rumors sometime during 2003 or 2004:

Q And when did you call him about the rumors?

A In the course of the due diligence process. I would say 2003, 2004. I cannot recall exactly.

(Id. at 37:7-9.)

Zurich's Response: Zurich admits that Mr. Caleca testified as indicated.

7. Thereafter, on unspecified dates prior to Sagres's investment in NuWave, Mr. Caleca contacted his other business contacts, who also repeated the rumors:

Q So, you talked to Mr. Volcy, what else did you do, concerning the rumors?

A We start calling all the big investors and contacts we have and to see if there was anyone invested with NuWave, if they had any opinion, and everyone knew it.

Q Everyone knew what?

A These rumors. I mean, there wasn't a single person which we called that was not aware of what was happening.

(Id. 37:25 to 38:9.)

Zurich's Response: Zurich admits that Mr. Caleca testified as indicated.

8. Mr. Caleca's testimony during the NuWave trial did not specify the dates on which the "big investors" repeated the slanderous statements about NuWave.

Zurich's Response: Zurich admits that Mr. Caleca did not specify the dates on which the "big investors" repeated the libelous statements published in the BackTrack Reports.

9. The trial court in the NuWave Action instructed the jury to consider republications of the same defamatory statements in awarding damages, stating, "Actionable defamation is not limited to the first publication or utterance of a defamatory statement, rather liability can be imposed upon one who repeats or re-publishes the defamatory statement of another." (DE 83-1, Ex. 2 to Goodman Dec. at 147:6-10.)

Zurich's Response: Zurich admits that Tudor accurately quoted the trial court but denies that the quoted instruction pertains to damages rather than liability.

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